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December 24, 2008

BY E-FILE

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001

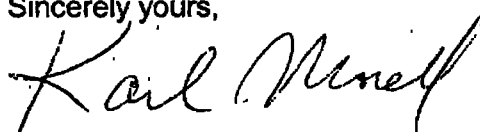
Re: STB Finance Docket No. 35187, Grand Elk Railroad, LLC – Lease
and Operation Exemption – Norfolk Southern Railway Company

Dear Acting Secretary Quinlan:

Attached for e-filing is Grand Elk Railroad's Reply To United
Transportation Union's Petition For Stay.

If you have any questions, please contact me.

Sincerely yours,



Karl Morell

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35187

GRAND ELK RAILROAD, L.L.C.
--LEASE AND OPERATION EXEMPTION--
NORFOLK SOUTHERN RAILWAY COMPANY

REPLY TO UNITED TRANSPORTATION UNION'S
PETITION FOR STAY

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Attorney for:
GRAND ELK RAILROAD, L.L.C.

Dated: December 24, 2008

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SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35187

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REPLY TO UNITED TRANSPORTATION UNION'S
PETITION FOR STAY

Grand Elk Railroad, L.L.C. ("GER"), hereby replies in opposition to the United Transportation Union's ("UTU") Petition for Stay dated December 18, 2008 ("Petition").¹

BACKGROUND

On November 3, 2008, GER filed its Verified Notice of Exemption, pursuant to 49 C.F.R. Part 1150, Subpart D—Exempt Transactions, to permit GER to lease and operate approximately 122.9 miles of rail lines owned by Norfolk Southern Railway Company ("NS") in Michigan and Indiana ("Notice of Exemption"). In the Notice of Exemption, GER explained that its projected annual revenues may exceed \$5 million and that, consequently, GER was in the process of complying with the notice requirements of 49 C.F.R. § 1150.32(e). On November 25, 2008, GER certified its compliance with Section 1150.32(e). On December 1, 2008, GER revised its certification and, in so doing, expressly pointed out that the Notice of Exemption in

¹ UTU also filed its Petition in STB Finance Docket No. 35188, *Watco Companies, Inc. – Continuance In Control Exemption – Grand Elk Railroad, L.L.C.* (not printed), notice served November 17, 2008. The Notice of Exemption in that proceeding became effective on December 3, 2008, thus, rendering moot UTU's request for a stay in that proceeding.

this proceeding would not become effective until January 31, 2009. Moreover, the labor notice attached to the certification points out that GER will not be consummating the transaction until March 1, 2009.

REPLY

The standards governing disposition of a request for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (“*Petroleum Jobbers*”). It is the movant’s obligation to justify the exercise of such an extraordinary remedy, *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985), and the movant carries the burden of persuasion on each of the four elements required for the extraordinary relief. *Canal Authority of Fla. V. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

As is demonstrated below, UTU has failed to meet the stay criteria.

UTU Is Unlikely To Prevail On The Merits

UTU does not contend, much less demonstrate, that it will prevail on the merits in this proceeding. UTU has not demonstrated, and cannot demonstrate that GER’s Notice of Exemption fails to comply with the Board’s applicable regulations or that the proposed transaction does not qualify for the class exemption.

Indeed, UTU’s request for a stay is based on a false premise: that this proceeding is similar to the one in STB Finance Docket No. 35063, *Michigan Central Railway, LLC* –

Acquisition and Operation Exemption – Lines of Norfolk Southern Railway Company (the “Michigan Central Transaction”), the approval of which was denied by the Surface Transportation Board (“Board”) in a decision served on December 10, 2007.

As explained in the Notice of Exemption, the transaction in this proceeding is significantly different and more routine than the Michigan Central Transaction:

- This transaction involves only a portion of the rail lines that were the subject of the much larger and significantly more complex Michigan Central Transaction. This transaction concerns the lease of 122.9 miles, with incidental trackage rights over a 0.43 mile segment, to a new company, while the Michigan Central Transaction involved the capital contribution of 299 miles of rail lines and 85.5 miles of trackage rights to a joint venture company.
- In this transaction, GER will be a wholly-owned subsidiary of Watco. Unlike the joint venture company proposed in the Michigan Central Transaction, NS will have no ownership, management or other interest in GER, will have no members on the GER board, and will have no ability – by veto rights or otherwise – to control internal economic, strategic or operating decisions of GER.
- In this transaction, NS will not share in GER’s profits. In the Michigan Central Transaction, the parties proposed to create a joint venture limited liability company that would have enabled NS – as a member of the limited liability company – to participate in the profits.
- GER will have the unrestricted ability to interchange with all of the rail carriers it physically connects with, and NS will receive no compensation for carloads

interchanged with other carries, unlike the structure in the Michigan Central Transaction.

UTU claims that it needs a stay so that it can review the discovery responses to ensure that there are no similar problems in this transaction as existed in the Michigan Central Transaction. UTU's contention, however, is misplaced in at least two fundamental respects. First, GER's Notice of Exemption would be void ab initio if this transaction were not as described in the Notice. Second, UTU has propounded certain discovery requests on GER and NS. GER intends to respond to the discovery requests in the very near future. Thus, UTU will have more than adequate time to review the responses and seek appropriate relief before the Board well before the Notice of Exemption becomes effective.

Denial Of The Stay Will Not Cause UTU Irreparable Harm

An administrative decision is not ordinarily stayed without an appropriate showing of irreparable harm. *Permian Basin Area Rate Case*, 390 U.S. 747, 777 (1968). UTU has failed to demonstrate that anyone will suffer irreparable harm in the absence of a stay.

UTU claims, but submits no supporting evidence, that an unidentified number of UTU members will be displaced as a result of this proposed transaction. Foremost, UTU's allegation is highly speculative. In any event, the allegation, even if accurate, does not rise to the level of sustaining a finding of irreparable harm. See STB Finance Docket No. 34145, *Bulkmatic Railroad Corporation – Acquisition Exemption – Bulkmatic Transport Company* (not printed), served December 27, 2001. The showing of “mere injuries, however substantial, in terms of money...expended in the absence of a stay” do not constitute irreparable injury because adequate compensatory relief can be had at a later date. *Petroleum Jobbers*, at 925. Neither the Board nor the courts have found economic injuries of this nature to be irreparable because they are

compensable through reparations. See Finance Docket No. 30965 (Sub-No. 1), *Delaware and Hudson Railway Co. – Lease and Trackage Rights Exemption – Springfield Terminal Railway Company* (not printed), served July 15, 1988. Indeed, the claimed loss of 72 employees was deemed inadequate by the Board to support a showing of irreparable harm. See STB Finance Docket No. 33326, *I&M Rail Link, LLC – Acquisition and Operation Exemption – Certain Lines of Soo Line Railroad Company D/B/A Canadian Pacific Railway* (not printed), served April 4, 1997.

A Stay Would Harm Shippers And GER

GER intends to upgrade the tracks and, as a short line operator, improve service to the shippers located on the leased lines. Thus, delaying the implementation of the involved transaction will have a material, adverse effect on the shippers located on the leased lines by delaying the benefits they will realize once GER commences operations. Any delay in GER's operations will cause GER to incur significant expenses, resulting in a loss of business that will be unrecoverable and cause uncertainty among its employees and the shippers located on the leased rail lines.

GER plans to spend \$2.7 million on track rehabilitation once it leases the lines from NS, including the replacement of 20,000 ties and the rehabilitation of two yards. GER's planned rehabilitation program will create new jobs and infuse money into the ailing Michigan economy. Any significant delay in the effective date of the Notice of Exemption will jeopardize GER's ability to complete the rehabilitation program during the construction season. Also, GER will be hiring more employees than are currently working on the lines. Consequently, GER's lease of the lines will not only improve service to the shippers on the leased lines but will also infuse capital into the Michigan economy and increase jobs at this critical time.

A Stay Is Not In The Public Interest

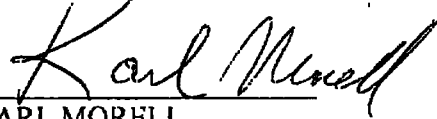
UTU has failed to demonstrate how issuance of a stay would further the public interest. UTU attempts to bootstrap the arguments raised by the Michigan Economic Development Corporation ("MEDC") earlier in this proceeding. But MEDC's arguments have already been rejected by the Board in a decision served in this proceeding on December 22, 2008. The only "concern" raised by UTU is whether the issues of concern to the Board in the Michigan Central Transaction exist in this proceeding. As explained above, that "concern" is totally without merit.

On the other hand, GER's proposed change in operations is intended to increase the efficiency of rail operations in the area, improve service to the shippers and increase jobs on the leased rail lines. For more than two decades, the Board and its predecessor have consistently stated that the public interest is served by encouraging the formation of short line and regional carriers. Consequently, granting the stay is contrary to the public interest.

CONCLUSION

GER respectfully urges the Board to deny UTU's Petition. The Petition falls woefully short of meeting the criteria for a stay.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Karl Morell", written over a horizontal line.

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Attorney for:

GRAND ELK RAILROAD, LLC

Dated: December 24, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, 2008, I have caused a copy of the foregoing Reply to be served on all parties of record.

A handwritten signature in cursive script, reading "Karl Morell", is written over a horizontal line.

Karl Morell